Perwira Habib Bank Malaysia Bhd v Pengkalan Enterprise Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7–24–169–90
LIM BENG CHOON J
29 AUGUST 1991

Contract *— Interest — Interest to be capitalized — Whether agreement to pay interest unconscionable or unreasonable — Contracts Act 1950 s 75*

Equity *— Estoppel — Charge over land — Chargor alleging chargee led or induced chargor to believe that chargee would not enforce its rights — Whether chargee estopped from proceeding with application*

Land Law *— Charge — Arbitration in regard to project pending — Development project on charged land not completed — Application for order for sale of land — Chargor alleging chargee led or induced chargor to believe that chargee would not enforce its rights — Whether application premature — Whether chargee estopped from proceeding with application*

Revenue Law *— Stamp duty — Charge over land — Stamp duty paid by reference to amount of loan — Provision for capitalization of interest on loan amount — Whether stamp duty chargeable on capitalized interest — Whether charge void or voidable for non-payment of stamp duty in respect of capitalized interest*

The defendant had charged a piece of land to the plaintiff bank as security for a loan. The plaintiff applied for an order for sale of the lands under the provisions of the National Land Code 1965 ('the Code') following the defendant's failure to comply with a notice of demand in Form 16D of the Code. The defendant opposed the application. The defendant said that the plaintiff knew of the defendant's intention to erect a multi-storey building on the land and to sub-divide the building into parcels and to sell such parcels to end-buyers. The defendant also said that the plaintiff had agreed to provide end-financing to the end-buyers and that, relying upon such agreement, the defendant had engaged a contractor to construct the building. The defendant also said that the plaintiff had undertaken to pay the contractor the sum of $33.88m from the proceeds of the sale of all the parcels. The contractor could not complete the construction of the building as a result of which an arbitration was pending between the defendant and the contractor. It was said that the plaintiff was aware of the situation and was a party to the negotiations between the defendant and the contractor. It was therefore contended that the plaintiff's application was premature and that the plaintiff was estopped from proceeding with the application. The stamp duty paid on the charge was for up to the loan sum of $2m only and since the terms of the charge provided for capitalization of interest on the loan amount, it was contended for the defendant that the stamp duty paid was insufficient. Although it was agreed that the plaintiff may vary the rate

of interest, the defendant said that there was a collateral term that the plaintiff should act reasonably and that, despite a protest by the defendant, the plaintiff had arbitrarily and unilaterally imposed unreasonable rates of interest which, in view of the provision regarding capitalization of interest, amounted to compound interest and/or contravened s 75 of the Contracts Act 1950 ('the Act').

Held, granting the plaintiff's application:

(1) The application was not premature. On the evidence, the defendant had not relied on the plaintiff's end-financing agreement in carrying out the project. The defendant had moved the plaintiff to enter into the end-financing agreement in order that it could get the plaintiff to give security in respect of the costs of completing the project in the sum of $33.88m to the contractor. The plaintiff had not by words or conduct led or induced the defendant to believe that it, the plaintiff, would not enforce its right under the charge. The existence of an arbitration of the disputes arising from the contract between the defendant and the contractor was of no concern to the plaintiff as it was not privy to the contract.

(2) Where interest is to be capitalized, the unpaid interest retains the character of interest and there need not be separate and further payment of stamp duty on the instrument concerned in respect of the interest.

(3) The capitalization of interest was intended to be part of the contract creating the charge between the parties. Considering that the rate of the capitalization of interest was the same as the prescribed rate of interest, it could not be said to be unconscionable or unreasonable. Section 75 of the Act was not applicable.

[Bahasa Malaysia summary

Defendan telah mencagarkan sebidang tanah kepada bank yang merupakan plaintif sebagai cagaran bagi satu pinjaman. Plaintif telah memohon untuk satu perintah jualan untuk tanah itu di bawah peruntukan Kanun Tanah Negara 1965 ('Kanun itu') selepas defendan gagal memenuhi satu notis tuntutan dalam Borang 16D Kanun itu. Defendan telah membangkang permohonan itu. Defendan mengatakan bahawa plaintif mengetahui akan hasrat defendan untuk membina sebuah bangunan bertingkat di atas tanah itu dan membahagikan bangunan itu kepada beberapa petak dan menjual petak-petak tersebut kepada pembeli akhir. Defendan juga mengatakan bahawa plaintif telah bersetuju untuk memberikan pembiayaan akhir kepada pembeli akhir dan bahawa, bergantung kepada persetujuan sedemikian, defendan telah mengambil seorang kontraktor untuk membina bangunan itu. Defendan juga mengatakan bahawa plaintif telah bersetuju membayar kontraktor sejumlah $33.88 juta daripada hasil jualan kesemua petak itu. Kontraktor tidak berjaya menghabiskan pembinaan bangunan itu, kesannya suatu timbangtara masih dinantikan di antara defendan dan kontraktor. Juga telah didakwa bahawa plaintif mengetahui tentang keadaan itu dan juga merupakan pihak kepada rundingan di antara

defendan dan kontraktor itu. Dengan itu hujah dibuat bahawa permohonan plaintif adalah terlalu awal dan bahawa plaintif diestop daripada meneruskan permohonan itu. Duti setem yang dibayar atas cagaran itu cuma setakat jumlah pinjaman sebanyak $2 juta dan oleh kerana syarat cagaran itu memperuntukkan bagi pemodalan bunga atas jumlah pinjaman, defendan telah berhujah bahawa duti setem yang dibayar adalah tidak mencukupi. Walaupun dipersetujui bahawa plaintif boleh menukar kadar bunga, defendan mengatakan bahawa terdapat syarat koleteral bahawa plaintif harus bertindak secara munasabah dan bahawa, biarpun satu bantahan daripada defendan, plaintif telah secara suka hati dan secara sendiri mengenakan kadar bunga yang tidak munasabah yang, memandangkan peruntukan berkenaan pemodalan bunga, berjumlah kepada bunga kompaun dan/atau melanggar s 75 Akta Kontrak 1950 ('Akta itu').

Diputuskan, membenarkan permohonan plaintif itu:

(1) Permohonan itu tidaklah terlalu awal. Mengikut keterangan, defendan tidak bergantung kepada persetujuan pembiayaan akhir daripada plaintif dalam melaksanakan projek itu. Defendan telah membuat plaintif memasuki persetujuan pembiayaan akhir itu supaya ia boleh meminta plaintif memberi cagaran bagi kos menyelesaikan projek itu yang berjumlah $33.88 juta yang harus dibayar kepada kontraktor. Plaintif tidak secara lisan atau tindakan membuat atau mendorong defendan untuk mempercayai bahawa ia, iaitu plaintif, tidak akan menjalankan haknya di bawah cagaran itu. Wujudnya timbangtara pertikaian yang timbul daripada kontrak di antara defendan dan kontraktor tidak kena-mengena dengan plaintif sebab ia bukan pihak kepada kontrak itu.

(2) Apabila bunga dipermodalkan, bunga yang tidak dibayar tetap memiliki ciri-ciri bunga dan tidaklah perlu bagi pembayaran berasingan dan tambahan duti setem atas suratcara tersebut berkenaan dengan bunga.

(3) Pemodalan bunga dimaksudkan menjadi sebahagian kontrak yang mewujudkan cagaran di antara pihak-pihak itu. Memandangkan yang kadar pemodalan bunga adalah sama dengan kadar bunga yang ditetapkan, tidaklah boleh dikatakan yang ia tidak berpatutan atau tidak munasabah. Seksyen 75 Akta itu tidak terpakai.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–407–1991.]

Cases referred to

1 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (folld)
2 *Sim Siok Eng v Government of Malaysia* [1978] 1 MLJ 15 (folld)
3 *Dawsons Bank Ltd v Nippon Menkwa Kabushihi Kaish (Japan Cotton Trading Co Ltd)* AIR 1935 PC 79 (folld)
4 *V Veeriah v General Manager, Keretapi Tanah Melayu* [1974] 1 MLJ 201 (refd)

5 *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd* [1991] 2 MLJ 559 (folld) A
6 *Kurella Ramamurti v Nalam Subbarao* AIR 1939 Madras 481 (refd)
7 *Jyoti Cold Stores v PF Corp* AIR 1973 P & H 38 (refd)

Legislation referred to
Contracts Act 1950 s 75 B
Contract Act 1872 [Ind] s 74

Ng Leong Huat (*Skrine & Co*) for the plaintiff.
Shahul Hameed Amiruddin (*Sri Ram & Co*) for the defendant.

Cur Adv Vult C

Lim Beng Choon J: On 5 February 1990 the plaintiff applied by way of this originating summons for an order that the whole of the land held under CT No 20074 Lot No 344 Section 83 Bandar Kuala Lumpur, Wilayah Persekutuan (hereinafter referred to as 'the disputed land') registered in the name of the defendant and charged to the plaintiff under the terms of a charge dated 8 September 1983 by Charge Representation No 14406/83 Jilid 318 Folio 136 and registered by the Registrar of Titles Wilayah Persekutuan on 9 September 1983 be sold by public auction. The plaintiff also prayed for the incidental reliefs that the said auction be held on a date to be fixed by the court and that it be carried out by the officials of the court E subject to the directions of the senior assistant registrar. The proceeds of the sale were to be applied to pay all costs and expenses of and incidental to the sale by auction and the remaining proceeds of the sale were to be applied to repay the loan plus interests owed by the defendant to the plaintiff.The plaintiff's application was supported by an affidavit affirmed by its manager (encl 2) on 15 February 1990 in which the deponent pointed out to the court the more material provisions contained in several clauses of the charge annexure and the demand made by the plaintiff to the defendant to repay the loan sum of $2,296,364.72 being the amount owed by the defendant to the plaintiff as at 30 September 1989 together with interest on the sum within the limit of $1.6m at the rate of 4.25%pa above the G plaintiff's base lending rate and on the sum in excess of $1.6m at the rate of 4%pa above the plaintiff's base lending rate from 1 October 1989 to the date of final payment to be made within seven days from the date thereof. The defendant failed to comply with the demand of the plaintiff and the latter thereafter through its solicitors sent the statutory notice of demand in Form 16D of the National Land Code 1965 ('the NLC'). Again the H defendant had failed to comply with the said Form 16D and had thereby defaulted [on its obligations]. Hence the institution of this action by the plaintiff.

After filing its memorandum of appearance on 22 February 1990 the defendant through its director, one Akau @ Lim Chong Yee ('Akau') I affirmed an affidavit on 16 June 1990 (encl 6) to oppose the present application of the plaintiff. The grounds relied on by the defendant to oppose the present application of the plaintiff can be summarized in three parts.

Firstly, Akau asserted that at all material times relating to this action the plaintiff knew of the defendant's intention to —

(a) erect a multi-storey building on all the land in dispute;
(b) sub-divide such building and to secure strata titles; and
(c) sell such sub-divided lots to end-buyers.

The plaintiff was fully aware that the repayment on the said loan would be from the proceeds of the sale of sub-divided lots and to which the plaintiff agreed to provide end-financing to ultimate purchasers. The offer of the plaintiff to provide end-financing was contained in an undated letter written by the plaintiff to the defendant who received it on 7 July 1984 (see exh 'LCY-1' annexed to encl 6). In complete reliance on the terms contained in the said letter exh 'LCY-1', the defendant appointed Sato Kogyo Co Ltd to construct the said multi-storey building on the disputed land on a turn-key basis. Furthermore the plaintiff did by letter of undertaking dated 12 October 1984 undertake to pay Sato Kogyo Co Ltd the sum of $33.88m from the proceeds of the sale of all units in the project. However the said Sato Kogyo Co Ltd did not complete the building in accordance with the building plans as there was a fundamental defect in the nature and character of the construction and no strata titles could be issued under the provisions of the Strata Titles Act 1985. Arising out of the above there was an arbitration pending between the said Sato Kogyo Co Ltd and the defendant. The plaintiff was and still is fully aware of the situation and was a party to the negotiations between the defendant and the said Sato Kogyo Co Ltd. It was therefore alleged that the plaintiff's claim was premature and/or the plaintiff was estopped from proceeding with the foreclosure proceedings.

Secondly, the defendant suggested that the relevant charge was void or voidable and in any event inadmissible evidence as it had been grossly understamped — the charge was only stamped for the payment of stamp duty up to the sum of $2m only. Hence where the charge annexure provided for the capitalization of interest, which exceeded the capital sum of $2m the charge documents were insufficiently stamped.

Thirdly, it was alleged that even though there was a provision for the plaintiff to vary the interest rate it was a collateral term to the agreement and the plaintiff should act reasonably. Despite protest by the defendant the plaintiff had arbitrarily and unilaterally imposed unreasonable rates of interest which when viewed with the capitalization clause amount to compounded interest.

In response to the affidavit of the defendant, the plaintiff through its manager affirmed a further affidavit on 17 August 1990 (encl 15). The averments stated therein may be summarized as follows.

The plaintiff did agree in principle to consider individual applications on a case to case basis to end-finance the ultimate purchasers not exceeding the limit of $33.88m but the plaintiff had not at any time received any application from any ultimate purchaser for credit facilities.

The plaintiff was at all material times and still is not privy to the contract between the defendant and Sato Kogyo Co Ltd.

As regards the allegation of understamping the charge, it was contended that as the charge was expressed to be limited to the sum of $2m together with interest and other bank charges (as set out in the terms of the annexure to the charge) it was in order for the charge instrument to be stamped for the sum of only $2m.

The deponent of the further affidavit (encl 15) then produced and marked as exhs 'B-1' and 'B-2' the true and correct copies of a letter from the defendant to the plaintiff and a letter from the plaintiff to Sato Kogyo Co Ltd respectively — both letters dated 12 October 1984 — to show the circumstances and conditions under which the undertaking was given by the plaintiff to Sato Kogyo Co Ltd. I shall have more to say about the contents of these two letters presently.

It was further confirmed that as at 27 August 1990 the defendant was indebted to the plaintiff in the sum of $2,560,312.07. Thereafter further interest would continue to accrue at the specified rates mentioned in the said affidavit.

From the assertions made by the defendant in the affidavit of Akau (encl 6) and the submission of counsel, it would appear to me that the issues raised by the defendant are these:

(1) Under the circumstances of the case, is the claim of the plaintiff premature and/or is the plaintiff estopped from proceeding with the foreclosure proceeding?
(2) Is the charge void or voidable as it has been grossly understamped?
(3) Is the interest rate imposed by the plaintiff so unreasonable that it amounts to compounded interest and/or in violation of s 74 of the Contracts Act 1950?

Before I consider the three aforementioned issues, it is appropriate for me to highlight some of the undisputed facts. First of all the disputed land was charged to the plaintiff on 9 September 1983 to secure banking facilities up to the amount of $2m in order to enable the defendant to erect a multi-storey building on the disputed land ('the project') and nothing was said in the annexure to the charge instrument that the loan was for end-financing of the project. Secondly, by an undated letter which the defendant received on 7 July 1984 (ten months after the registration of the charge) the plaintiff agreed in principle to consider individual application for a loan to purchase an apartment on a case to case basis up to an end-finance limit of $33.88m based on the terms as set out in the undated letter (see exh 'LCY-1' annexed to the affidavit of the defendant encl 6). Thirdly, apparently there was negotiation carried out between the plaintiff and the defendant thereafter and as a result of the negotiation the plaintiff agreed to give a letter of undertaking for the total amount of the construction cost of the project to Sato Kogyo Co Ltd subject to the following conditions (see the letter of undertaking dated 12 October 1984 annexed to the further affidavit of the plaintiff encl 15):

(1) This project *must* be completed by 31 August 1986.
(2) The total amount of the construction cost of $33.88m ringgit: thirty-three million eight hundred and eighty thousand only shall be paid *one*

year after the issuance of the temporary certificate of fitness (ie 31 August 1987 on the above project as a whole).

(3) Any other condition stipulated in the contract between Sato Kogyo Co Ltd and Pengkalan Enterprise Sdn Bhd *that has a bearing towards the completion of the project* are to apply.

(4) A letter of undertaking from Pengkalan Enterprise Sdn Bhd to Perwira Habib Bank (M) Bhd reference No WFT/2135–84 dated 12 October 1984 authorizing the settlement of the construction cost is attached as Appendix I and forms an *integral part of* this letter of undertaking. (Emphasis supplied.)

The letter of undertaking of the defendant (see exh 'B-1' annexed to the plaintiff's affidavit encl 15) mentioned in the aforementioned letter was given to the plaintiff in consideration of the plaintiff's issuance of its letter of undertaking to Sato Kogyo Co Ltd and contained the following terms:

(1) To undertake to place all proceeds of sale, those financed by Perwira Habib Bank and those not under Perwira Habib Bank's end-finance, as fixed deposit under lien to you.

(2) To authorize you to retain all end-finance proceeds from units financed by Perwira Habib Bank in the form of fixed deposit under the lien to you.

(3) To authorize you to remit the said funds not exceeding $33.88m to Sato Kogyo Co Ltd one year after the issuance of temporary certificate of fitness to the building as whole.

(4) The rate of interest shall be the rates prevailing at the time of fixed deposit emplacement.

(5) This undertaking is to remain in effect up to the date that the funds is remitted to Sato Kogyo.

Quite apart from the aforementioned three undisputed facts, I must, in the absence of any denial by the plaintiff accept as true the assertions of the defendant relating to the facts as set out in its affidavit encl 6 with one exception, namely, the assertion of the defendant that 'In complete reliance on the terms contained in the letter of the plaintiff exhibited as 'LCY-1' (annexed to encl 6), the defendant appointed Sato Kogyo Co Ltd to construct the said multi-storey building on the disputed land on a turn-key basis.' I cannot accept this assertion of the defendant as true simply because it is inconsistent with the evidence adduced in the present case and I say so for these reasons. In the first place there is no evidence to establish that the plaintiff had any say in the construction of the multi-storey building. Indeed it was not the business of the plaintiff to do so. How the project was to be carried out and the appointment of a contractor to do so was entirely the business of the defendant. In the second place the defendant, after having charged the disputed land to the plaintiff for banking facilities up to the limit of $2m, had to appoint a contractor to carry out the project and it selected Sato Kogyo Co Ltd to be the contractor. However, this company quoted the costs of carrying out the project on a turn-key basis in the sum of $33.88m and obviously this company would want some sort of security to ensure that they would be paid upon completion of the project. Placed in such a situation, the defendant had no choice but to revert to the plaintiff to grant the security requested by Sato Kogyo Co Ltd. Needless to say the

plaintiff as a bank would never grant such a security unless it could be ensured that it was to its advantage to grant the security to the said company. To ensure the plaintiff that it would not lose out in granting the security to Sato Kogyo Co Ltd, the defendant thereupon proposed to the plaintiff to undertake the end-financing to ultimate purchasers of the apartments in the multi-storey building and agreed to deposit all payments made by the ultimate purchasers in a fixed deposit account in favour of the plaintiff who would have a lien over all the moneys deposited therein. Hence the defendant gave its undertaking by letter dated 12 October 1984 exhibited as 'B-1' to encl 15 which I have reproduced above. In return the defendant thereafter gave its letter of undertaking (exh 'B-2' annexed to encl 15) to Sato Kogyo Co Ltd which again I have reproduced earlier. It is therefore not true that the defendant relied on the letter of undertaking given by the plaintiff to appoint Sato Kogyo Co Ltd to carry out the project but rather the other way round, namely, that it was the defendant who moved the plaintiff to accept the end-financing of the ultimate purchasers and offered to allow the plaintiff to have a lien over all payments made by the ultimate purchasers as an incentive to the plaintiff to grant the security sought by Sato Kogyo Co Ltd. I made this observation at this stage because it is an important factor (as can be seen later) in my consideration of the issue of estoppel raised by the defendant.

Reverting to issue (1) raised by the defendant, I accept the fact that in granting the banking facilities to the defendant the plaintiff knew that the defendant required loans from the plaintiff up to a limit of $2m in order to carry out the project and ultimately to sell the sub-divided lots in the multi-storey building with strata titles to end-buyers. Indeed the plaintiff in its affidavit had not denied that it had knowledge of the defendant's intention in applying for banking facilities. I also accept the fact that by providing the end-financing the plaintiff agreed that the repayment of the loans obtained from the banking facilities granted by the plaintiff would be from the proceeds of the sale of the sub-divided lots to ultimate purchasers. If based on these facts alone and no others I would have held that the claim of the plaintiff is premature and/or the plaintiff is estopped from proceeding with the foreclosure proceeding. If an authority is necessary I would cite the principle stated by Lord Cairns in *Hughes v Metropolitan Railway Co*[1] at p 448 in these words:

> ... it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

The principle stated by Lord Cairns was cited with approval by our then Federal Court in *Sim Siok Eng v Government of Malaysia*[2] where Lee Hun Hoe CJ (Borneo) (as he then was) said at p 20:

A The equitable principle enunciated by Lord Cairns in *Hughes*'s case (1877) 2 App Cas 439 appears to be akin to the doctrine of estoppel and covers promises as well as statements of fact. It has been described as 'promisory estoppel' in contrast to an estoppel founded upon a misrepresentation of fact. That principle was discussed in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 which was cited and dealt with by the learned judge.

B The matter, however, does not end here for I am satisfied that the defendant could not ground estoppel on the end-financing agreement and I say so for these reasons. As I have said earlier it is clear that the defendant did not rely on the end-financing agreement in carrying out the project and I need not repeat the reasons for stating so as I have dealt with this aspect of C the case at some length in the earlier part of this judgment. All I need to say here is that it was the defendant who moved the plaintiff to enter into the end-financing agreement in order that it could get the plaintiff to give security in respect of the costs of completing the project in the sum of $33.88m to Sato Kogyo Co Ltd. Without the security which the plaintiff D subsequently gave in the form of the letter of undertaking the project would not even have got off the ground! It is therefore a case of the plaintiff assisting the defendant and not, I repeat not, inducing it to carry out the project. That being the case surely it cannot be said that the plaintiff had by words or conduct led or induced the defendant to believe that it, the plaintiff, would not enforce its rights under the charge over the disputed E land.

Apart from what has been discussed above, it must also be noted that the letter of undertaking granted by the plaintiff to Sato Kogyo Co Ltd, on which the defendant grounded an estoppel, is not unconditional in the sense that it guaranteed payment of the sum of $33.88m regardless of what F might happen. The said letter is subject to four conditions, namely: (i) the project *must* be completed by 31 August 1986; (ii) the total amount of construction cost of $33.88m would be paid only one year after the issuance of the temporary certificate of fitness, ie 31 August 1987; (iii) any other condition stipulated in the contract between Sato Kogyo Co Ltd and the defendant that had *a bearing towards completion of the project* were to G apply; and (iv) the letter of undertaking of the defendant regarding payment of the construction cost one year after the issuance of the temporary certificate of fitness formed an integral part of the plaintiff's letter of undertaking. Thus the letter of undertaking of the plaintiff does not amount to a clear and unambiguous statement to pay the construction costs in any event and the defendant is not allowed in law to ground estoppel on such H a letter of undertaking. Thus it is said by the Privy Council in *Dawsons Bank Ltd v Nippon Menkwa Kabushihi Kaish (Japan Cotton Trading Co Ltd)*[3] at pp 83–84:

> A statement to ground an estoppel must be clear and unambiguous: 3 Ch 82(1). But even if their Lordships were to accept the meaning attributed to the letters I OK by the plaintiffs and the High Court, it would be impossible to hold that they constitute a representation which could ground an estoppel; for the meaning so attributed is not a representation of an existing fact but a representation of a future intention, which might or might not be enforceable in contact.

Applying the principle laid down in the *Dawsons Bank Ltd* case[3] to the case before me likewise the defendant could not ground estoppel on the letter of undertaking given by the plaintiff to Sato Kogyo Co Ltd simply because the representation contained in the said letter is not a representation of existing fact but a representation of future intention which might or might not be enforceable in contract. Bearing in mind that Sato Kogyo Co Ltd failed to complete the project in accordance with the specifications which caused Bandar Raya to refuse to issue a certificate of fitness thereby disabling the defendant from sub-dividing the lots in the multi-storey building for the purpose of getting strata titles, Sato Kogyo Co Ltd is clearly in breach of the fundamental terms of the letter of undertaking which specified (1) that the project must be completed by 31 August 1986 and that payment of the sum of $33.88m was to be made a year after the completion of the project. The default on the part of Sato Kogyo Co Ltd rendered the letter of undertaking unenforceable against the plaintiff contractually. That being the case the agreement entered into by the plaintiff with the defendant whereby the former agreed to the end-financing of the project has also became nugatory as there would not be any end-purchasers.

As regards the existence of an arbitration of the disputes arising from the building contract entered into between the defendant and Sato Kogyo Co Ltd, it is no concern of the plaintiff as it is not privy to the said contract. The defendant itself created the situation with which it is now facing and it cannot in any event blame the plaintiff. I therefore hold that the issue of estoppel must fail — see *V Veeriah v General Manager, Keretapi Tanah Melayu.*[4]

Turning to issue (2), the charge was duly stamped based on the amount of $2m being the limit of the banking facilities granted by the plaintiff to the defendant. The allegation of understamping was in relation to the accrued interests and interests that had been capitalized which the defendant failed to pay. The answer to such an allegation can be found in the judgment of Gunn Chit Tuan SCJ who delivered the judgment of the Supreme Court in the case of *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd*[5] where his Lordship said at p 563:

> Although it has been provided in the instruments concerned in each of these cases that interest be capitalized, yet as unpaid interest it retains the character of interest and the instruments concerned need not be separately and further stamped under s 14 of the Act [that is the Stamp Act 1949 (consolidated and revised 1989)]. In these cases the principal sums of money lent or the amounts secured were limited to $8m and $150,000 respectively and are distinguishable from the case of *Re Waterhouse's Policy* [1937] Ch 415 where the current account was without limit. It is therefore our judgment that s 28(1) of the Act is also applicable to these cases so that stamp duty is only chargeable on the original loan amounts.

With regard to issue (3), it is to be noted that the defendant contended that the plaintiff had no right to charge compound interest and its counsel in his submission elaborated on this issue by arguing that in charging compound interest it amounted to a penalty and violated s 74 of our Contracts Act 1950 ('the 1950 Act'). Apparently counsel cited the wrong section of the

A 1950 Act; it should be s 75 of the said Act. In support of his contention he cited two Indian High Court cases, namely, the case of *Kurella Ramamurti v Nalam Subbarao*[6] and *Jyoti Cold Stores v PF Corp.*[7] In respect of this issue it is to be noted that in cll 4 and 5 of the annexure to the charge the plaintiff is entitled to capitalize interest which is the same as compounding interest. Now in the *Kurella Ramamurti* case,[6] Pandrang Row J held that the stipulation in the mortgage deed for payment of compound interest at the rate of 12%pa was in the nature of a penalty and was not binding on the mortgagor. However the learned judge did not cite any authority to back up his conclusion. On the other hand, in the *Jyoti Cold Stores* case,[7] Gujral J, after a careful scrutiny of the provisions of s 74 of the Indian Contract Act 1872 particularly the explanation stated therein (which is in pari materia with s 75 of our Contracts Act 1950 and the explanation stated therein) and also after a careful review of a number of authorities, rejected the appeal of the mortgagor and went on to say at p 39:

> The above observations are fully attracted to the facts of the present case. Considering the facts of the present case, there is *nothing to show that the increased rate of interest was not intended to be part of the primary contract between the parties.* The enhanced rate of interest is also *not unconscionable or unreasonable* in the circumstances of the case. (Emphasis added.)

I prefer to accept the approach adopted by Gujral J for obvious reasons. In the case before me it is my finding that pursuant to cll 4 and 5 of the charge annexure the capitalization of interest was intended to be part of the contract creating the charge between the parties. Considering that the rate of the capitalization of interest is the same as the prescribed rate of interest it cannot be said to be unconscionable or unreasonable and s 75 of the 1950 Act is not applicable. I must therefore also reject issue (3) raised by the defendant.

Under the circumstances judgment is given in favour of the plaintiff and I allow an order in terms of the plaintiff's prayers (1), (2), (3), (4) and (5) as set out in this originating summons. The defendant is also directed to pay the costs of this proceeding.

Application allowed.

Reported by PS Ranjan